Decision **DRAFT DECISION OF ALJ PRESTIDGE (Mailed 12/27/2005)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Application of Pacific Gas and Electric Company (U 39 M), a California corporation, and Bay Point Venture One, LLC, a California Limited Liability Company, for an Order Authorizing the Sale and Conveyance of Two Parcels of Land in Contra Costa County Pursuant to Public Utilities Code Section 851. | Application 05-01-026 (Filed January 27, 2005) |

# OPINION GRANTING APPROVAL UNDER PUBLIC UTILITIES CODE SECTIONS 851 AND 853(b) FOR CONVEYANCE OF A PARCEL OF LAND IN CONTRA COSTA COUNTY TO BAY POINT VENTURE ONE, LLC

## I. Summary

This decision grants the application of Pacific Gas and Electric Company (PG&E) for Commission authorization under Pub. Util. Code § 851[1] for PG&E to convey a 2.01-acre parcel of land located in unincorporated Bay Point area in Contra Costa County to Bay Point Venture One, LLC (BP1).[2] [3]

[1] All statutory references are to the Public Utilities Code unless otherwise stated.

[2] The application was filed on January 27, 2005. In Resolution ALJ 176-3147, dated February 10, 2005, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary.

[3] On March 2, 2005, the Commission's Division of Ratepayer Advocates (DRA) filed a protest, which addressed only the ratemaking aspects of the application. DRA does not oppose PG&E's sale of the property to BP1.

We also exempt PG&E's previous sale of 42.93 acres of adjacent land to Bigge Crane & Rigging Company (Bigge Crane), BP1's predecessor in interest, from Section 851's requirement for prior Commission approval pursuant to Section 853(b) and approve this transaction on a prospective basis only. We deny PG&E's request for retroactive approval of this sale pursuant to Section 851.

In addition, we defer consideration of issues related to allocation of PG&E's gain on sale resulting from these transactions until after the Commission has issued a decision in the gain on sale rulemaking proceeding (R.04-09-003).

## II. Background

### A. The Transactions

PG&E requests authorization pursuant to Section 851 to sell a parcel of unimproved land,[4] which consists of approximately 2.01 acres (Property A), to BP1 for $50,000.

PG&E also seeks retroactive authorization pursuant to Section 851 for the sale of a second piece of property, which consists of approximately 42.93 acres[5] (Property B), to Bigge Crane and BP1[6] for $2,050,000. PG&E first entered into an agreement to sell this property to Bigge Crane in 2001 without first seeking Commission approval as required by Section 851. Bigge Crane subsequently assigned its interest in Property B to BP1, and PG&E conveyed Property B to BP1 in 2002 without Commission approval. PG&E states that its failure to seek prior

[4] This parcel of land is identified as Contra Costa Assessor's Parcel No. 098-240-003.

[5] This property consists of two parcels identified as Contra Costa Assessor's Parcel Nos. 098-250-015 and 098-250-016.

[6] At the time of the sale of Property B, Bigge Crane and BP1 were under common ownership. In May 2002, Bigge Crane assigned its rights and interests in Property B to BP1 pursuant to a written agreement.

Commission authorization for these transactions was an inadvertent error. In the alternative, PG&E asks the Commission to exempt this sale of Property B to Bigge Crane and the conveyance to BP1 from the requirements of Section 851 pursuant to Section 853(b).

PG&E originally acquired both properties as a buffer zone for its Pittsburg Power Plant. PG&E acquired Property A in 1974 and placed it in ratebase in the same year. PG&E acquired Property B in 1979 and placed it in ratebase in the same year. PG&E removed both Property A and Property B from ratebase and transferred them to non-utility accounts in 1985 and 1986, respectively.

PG&E is retaining an easement for its facilities located on Property A. Further, according to the application, at the time of the sale of Property B, PG&E erroneously believed that there were no PG&E facilities located on Property B. However, as PG&E began preparations for the sale of Property A, PG&E realized that an existing distribution pole line is located on Property B. PG&E has therefore required BP1 to grant PG&E an easement for the distribution pole line on Property B, as a condition of the sale of Property A to BP1. PG&E is also retaining rights of ingress and egress to both Property A and Property B and the right to enter the properties for maintenance of utility facilities.

PG&E states that since it has retained easements for the distribution pole lines, maintenance of the facilities, and ingress and egress from both properties, it is not foreseeable that PG&E will otherwise need to own either Property A or Property B in fee for utility purposes ever again. According to the application, PG&E will therefore not need to purchase replacement property in the future and can maintain its existing service to customers with no change in cost and no additional burden on existing facilities after the sale of the properties. In addition, after the sale of the properties, PG&E would no longer be responsible

for maintenance of the property, the payment of property taxes, or liability for any injury to trespassers or others who enter Property A or Property B.

## B. The Proposed Agreements

### 1. Purchase and Sale Agreements

PG&E entered into a purchase and sale agreement with BP1 for the sale of Property A for $50,000 on April 7, 2003. This agreement is contingent upon Commission approval of the transaction. The property has not yet been conveyed to BP1.

PG&E also entered into a purchase and sale agreement with Bigge Crane for the sale of Property B for $2,050,000 on July 24, 2001. PG&E and Bigge Crane also signed three amendments of the purchase and sale contract on December 21, 2001, March 12, 2002, and May 14, 2002. These amendments extended the closing date for the transaction and confirmed that Bigge Crane had approved the condition of the property, PG&E's title to the property, and the easements reserved by PG&E. In addition, the first two amendments extended the time for Bigge Crane to perform environmental and ecological investigations of the property. On May 15, 2002, PG&E and Bigge Crane entered into another agreement, in which Bigge Crane assigned its interest in Property B to BP1. PG&E conveyed Property B to BP1 by grant deed in May 2002 without Commission approval.

Under the purchase and sale agreements, PG&E is entitled to reserve easements for all existing or proposed utility facilities located on or under the property, including PG&E's existing power poles and lines. BP1 may not assign its interest in the property without the prior written consent of PG&E and the satisfaction of certain other conditions imposed by PG&E. The agreements also

address escrow instructions and other items typically included in property sales agreements.

The agreements state that PG&E is selling both Property A and Property B on an "as is" basis and that PG&E has made no warranties or representations regarding the condition of the property, including the presence or absence of electromagnetic fields (EMFs) or hazardous substances at the sites, the condition of the groundwater, compliance with legal requirements, or the suitability of the property for BP1's or Bigge Crane's purposes. However, PG&E acknowledged in the agreements that at some point, PG&E may have handled, treated, stored and/or disposed of hazardous substances on the property. The agreements advise BP1 and Bigge Crane to investigate the condition of the properties. Under the agreements, PG&E is not responsible for any EMFs or hazardous substances on, under, about or otherwise affecting the property.

In the agreements, BP1 and Bigge Crane also agreed to indemnify, defend, and hold PG&E harmless from any and all claims, losses, causes of action, or liability that arise out of or are in any way connected with the properties and that result from BP1's or Bigge Crane's entry onto or activities conducted at the properties before the close of escrow.

### 2. The Release and Indemnity Agreements

Under the release and indemnity agreements, BP1 and Bigge Crane bear all responsibility, costs and risks associated with the presence of any hazardous substances or EMFs on the properties. The agreements state that BP1 and Bigge Crane have had the opportunity to perform environmental inspections, tests, and studies, including invasive testing and groundwater sampling on, under, about, or adjacent to the properties as necessary to assume this risk of liability. The agreements also state that the parties considered BP1's

and Bigge Crane's assumption of these risks in establishing the purchase price for the properties.

BP1 and Bigge Crane each agreed to release, exonerate, and discharge PG&E from any claims or liability that may result from the presence or suspected presence, generation, processing, use, management, treatment, storage, disposal, remediation, transportation, recycling, emission, release, or threatened emission or release of any hazardous substances or EMFs on, about, adjacent to, or affecting the property, whether in the past, present, or future.

Since BP1 and Bigge Crane waived the protections of Civil Code Section 1542, these obligations will apply to future claims based on facts of which BP1 and Bigge Crane were not aware at the time they entered into the agreements.

The terms of the release and indemnity agreement will apply to the successors and assigns of the parties. However, a transfer of the property does not relieve BP1 or Bigge Crane of their obligations under the agreements.

### C. Environmental Review

California Environmental Quality Act (CEQA)[7] applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities."[8] Since the Commission must act on PG&E's Section 851 application and issue a discretionary decision without which the project cannot proceed, the

[7] Public Resources Code Section 21000, *et seq*.

[8] Title 14 of the California Code of Regulations (hereafter, CEQA Guidelines), Section 15002.

Commission must act as either a Lead Agency or Responsible Agency under CEQA.

The County of Contra Costa is the Lead Agency for CEQA review for the light industrial/business park project. BP1 proposes to develop a light industrial/business park in the Bay Point area of east Contra Costa County. The proposal includes a 23-lot subdivision and preliminary development plan on approximately forty five acres of vacant land, located at the northeast intersection of Port Chicago Highway and Pacifica Avenue in the Bay Point area of east Contra Costa County. The Commission is a Responsible Agency for the project. CEQA requires the Commission to consider the Lead Agency's environmental documents and findings before acting upon or approving the sale and project.[9] PG&E's application includes the following environmental documents prepared by the Lead Agency for the BP1 project:

- The Notice of Determination, dated July 13, 2004
- Notice of Public Review and Intent to Adopt a Proposed Mitigated Negative Declaration, dated October 23, 2003

We have reviewed the County's environmental documents and find them to be adequate for our decision-making purposes.

In evaluating the BP1 project, the Notice of Public Review and Intent to Adopt a Proposed Mitigated Negative Declaration concluded that potential environmental impacts in the following areas were less than significant: agricultural resources; air quality; geology/soils; hazards; land use; population/housing; public services; recreation; transportation/traffic; utilities/service systems.

[9] CEQA Guidelines Section 15050(b). The specific activities that must be conducted by a Responsible Agency are contained in CEQA Guidelines Section 15096.

The Notice of Public Review and Intent to Adopt a Proposed Mitigated Negative Declaration found potentially significant impacts that could be mitigated to less than significant levels in the following areas: aesthetics (effect on a scenic vista, light glare); biological resources (habitat, sensitive species, wetlands, local policies); cultural resources (archeological resource); hydrology and water quality (waste discharge, runoff); noise (ambient noise). Mitigation measures to reduce view obstruction of waterfront from residential area included development standards that permit a maximum of fifty percent (50%) lot coverage. This limitation, together with the design standards for new buildings in the area, will reduce this impact level to less than significant. Mitigations to reduce ambient light from exterior lighting to the area included a submission of a lighting plan by the applicant 30 days prior to issuance that provides that low-lying and exterior lights on the buildings shall be deflected so that lights shine onto the Applicant's property and not toward adjacent properties. Mitigations to reduce impact of potential nesting sites for the Burrowing Owl in the vicinity of the project included contacting the California Department of Fish and Game to determine appropriate measures for protection of any nests discovered. A construction schedule will be recommended to occur outside of nesting season. Mitigations to reduce impacts on western pond turtle habitat, loggerhead shrike, and California horned lark included pre-construction surveys. If these species are present, construction activities within the specific habitat area should be modified consistent with Department of Fish and Game recommendations. Mitigations to reduce impacts on potential prehistoric archaeological materials that could be found buried under natural alluvium and historic filling at the site include stopping work within 50 feet of any discovery until a qualified archaeologist has been retained to inspect the discovery, assess its significance

and offer a proposal for procedures appropriate to further investigate and/or mitigate adverse impacts to the cultural resources encountered. Mitigations to reduce impacts to water quality include requiring contractors to develop and implement a Storm Water Pollution Prevention Plan for construction of proposed facilities, as required by the Regional Water Quality Control Board. Installation of pipe and excavation of the earth channel shall occur during periods of low or no flow to avoid water quality impacts. If water is present, (i.e., from summer nuisance flows) the construction area shall be dewatered by pumping water through a diversion pipe to be discharged downstream in a non-erosive manner. Sediment traps and/or filter fabric shall be used as needed. Mitigations to reduce impacts of surface contaminants generated from cars, roadways, industrial activities, and landscaping include the preparation of a Storm Water Design plan designed to significantly reduce and where feasible, eliminate, the off-site migration of sediment and storm water pollutants associated with storm water runoff. Mitigations to reduce impacts of noise include implementing the County construction noise policy limiting construction to the hours of 7:30 am – 5:00 pm Monday-Friday, unless modified by the Zoning Administrator; requiring construction contractors to include measures to reduce equipment noise; and installing a sound wall or masonry fence and adequate landscaped buffer for the residential area.

With respect to these potentially significant environmental impacts, we find that the County has adopted feasible mitigations and has reasonably concluded that the specified mitigation measures will either eliminate or substantially reduce the impacts to less than significant levels.

### D. Ratemaking Considerations

According to the application, the original cost and net book value of Property A is $6,303. The application states that PG&E will receive $43,697 as the pre-tax gain on sale and an anticipated $25,892 as the after-tax gain on sale.

According to the application, the original cost and net book value of Property B was $782,043. PG&E realized an after-tax gain on sale in the amount of $680,474. PG&E's pre-tax gain on sale was $1,148,402.

Neither Property A nor Property B have been included in PG&E's ratebase since l985 and l986, respectively.

PG&E claims that the gain on sale from both transactions should be allocated to shareholders because the property is not in ratebase, and shareholders, rather than ratepayers, made the initial investment to buy the land. PG&E further argues that since the removal of Property A and Property B from ratebase, shareholders, not ratepayers, have paid all property taxes and maintenance expenses for both properties.

In its protest, DRA argues that since ratepayers paid the expenses associated with both properties, including taxes and maintenance, during the time that the properties were in ratebase, ratepayers should receive a proportional share of PG&E's gain on sale. More specifically, DRA contends that since PG&E acquired Property A in 1974 and did not remove it from ratebase until 1986, ratepayers paid the expenses for the property for 12 of the 30 years that PG&E owned the property and are therefore entitled to 40% of the after tax gain on sale of $25,892 or $10,356. Similarly, in the case of Property B, DRA argues that since ratepayers paid expenses for approximately 6 of the 23 years of PG&E's ownership of the property, ratepayers are entitled to approximately 26% of the after tax gain on sale of $680, 474 or $177, 715.

DRA and PG&E agree that if the Commission chooses not to allocate the entire gain on sale to shareholders pursuant to traditional ratemaking for nondepreciable land, the Commission may determine the proper allocation of the gain on sale after the issuance of a decision in R.04-09-003. However, DRA opposes deferral of our consideration of the gain on sale issue here until certain disputed factual issues have been resolved. These disputed issues are as follows:

1. For Property A, DRA contends that PG&E's revenue requirement is $7,883. DRA derived this figure by multiplying the book value for the property by the net to gross multiplier (1.797725) multiplied by PG&E's rate of return (.0877).
2. For Property A, DRA contends that the annual expense is $6,341. DRA derived this figure by dividing the book value by the total ratebase ($7,831,000,000), multiplied by the total expenses ($993,133).
3. For Property B, DRA contends that PG&E's revenue requirement is $323,204. DRA derives this figure by multiplying the book value by the net to gross multiplier (1.797725) multiplied by PG&E's rate of return (.0877).
4. For Property B, DRA maintains that the annual expense is $25,998. DRA derives this figure by dividing the book value by the total ratebase ($7,831,000,000), multiplied by the total expenses ($993,133)."

PG&E disagrees with each of the above four statements on the grounds that since the properties are not in ratebase, these statements are incorrect.[10] [11]

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[10] Case Management Statement and Submission of Stipulated Facts of PG&E and DRA, filed April 15, 2005, at pages 5-7.

[11] The parties did stipulate to certain facts that may be relevant to allocation of PG&E's gain on sale, as follows:

- PG&E's current rate of return is 8.77%.
- PG&E's net to gross multiplier for electric utility is 1.797725.

*Footnote continued on next page*

PG&E also contends that it does not track annual expense and revenue requirement data for specific properties and that it has no way to reliably estimate these figures for Property A and Property B, which have been out of rate base for many years. PG&E claims that it only tracks this type of information for its properties in the aggregate. PG&E also argues that unless the Commission decision in the gain on sale rulemaking (R.04-09-003) determines that these disputed issues are relevant to allocation of the gain resulting from the sale of utility property, the Commission and the parties should not spend further time and resources on the disputed factual issues.

In contrast, DRA argues that deferral of these disputed factual issues until after the Commission decision in the gain on sale rulemaking (R.04-09-003) does not make sense, because R.04-09-003 most likely will not address these factors, and the Commission would then have to conduct additional proceedings to resolve the disputed factual questions in this proceeding.

We defer our determination regarding the allocation of PG&E's gain on sale in this proceeding until after the issuance of our decision on the gain on sale

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- PG&E's data response indicated that the information regarding the amount of annual property taxes for Property A from 1974 to 1985 was not available. However, the following table was available:

  2003 - $1535
  2004 - $1592

- The annual property taxes for Property B from 1994 to 2003 are as follows:

| | |
|---|---|
| 1994 - $20,448 | 1999 - $25,704 |
| 1995 - $20,418 | 2000 - $25,121 |
| 1996 - $25,331 | 2001 - $31,398 |
| 1997 - $25,449 | 2002 - $32,009 |
| 1998 - $25,578 | 2003 – sold |

rulemaking (R.04-09-003). We believe that the proper allocation of the gain resulting from the sale of utility property between ratepayers and shareholders should be considered on a broad policy basis in R.04-09-003, with participation from a greater number of affected parties. In the meantime, we direct PG&E to track this revenue from the sale of both properties in its Real Property Gain/Loss on Sale Memorandum Account.[12]

We also defer further consideration of the disputed factual issues here until after the issuance of our decision in R.04-09-003. We note that, depending on the outcome of R.04-09-003, the relevance of these issues to the allocation of PG&E's gain on sale in this proceeding is uncertain. Moreover, PG&E has stated that it does not have records available regarding the disputed factual issues for individual properties that have long been removed from ratebase. Therefore, we do not believe that either the parties or the Commission should expend further resources on these issues unless our decision in R.04-09-003 finds them relevant to the allocation of PG&E's gain on sale.

### E. Discussion

Section 851 provides that no public utility other than a common carrier by railroad shall sell the whole or any part of property necessary or useful in the performance of its duties to the public without first having secured Commission authorization.

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[12] Since PG&E previously sold Property B without our authorization in violation of Section 851, we direct PG&E to place an amount equivalent to its revenues from the sale of Property B in its Real Property Gain/Loss on Sale Memorandum Account and to track these revenues, pending the resolution of the gain on sale issues in this proceeding after the issuance of our final decision in R.04-09-003.

The primary question for the Commission in Section 851 proceedings is whether the proposed transaction is in the public interest. In reviewing a Section 851 application, the Commission may "take such action, as a condition to the transfer, as the public interest may require."[13] The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers.[14]

We find that the proposed sale of Property A to BP1 is in the public interest. PG&E no longer needs to own the property for utility purposes and has reserved easements as necessary to carry out its operations and to serve its customers and the public. BP1 will be able to use the property for a productive purpose as the site for a light industrial/business park and a subdivision. Further, although PG&E has acknowledged that hazardous substances and EMFs may exist at or around the property, PG&E is adequately protected from any potential liability by the terms of the purchase and sale agreement and the release and indemnity agreement. Our CEQA review of the proposed transaction indicates that the sale of the property to BP1 will not have significant adverse effects on the environment. For all of the foregoing reasons, we grant the application of PG&E to sell Property A to BP1 pursuant to Section 851, effective immediately.

However, we deny PG&E's request for retroactive approval of the previous sale of Property B to Bigge Crane and subsequent conveyance of the property to BP1 pursuant to Section 851. We do not condone the sale of utility property that is used and useful in the performance of the utility's duties to the

[13] D.3320, 10 CRRC 56, 63.

[14] D.00-07-010, at p. 6.

public without prior Commission approval as required by Section 851. Under Section 851, sales of such utility property without prior Commission approval are void.[15] In addition, Section 851 does not grant the Commission authority to retroactively approve sales of utility property.[16]

PG&E has requested that, in the alternative, the Commission find that the sale of Property B to Bigge Crane was exempt from Section 851's requirement for advance Commission approval pursuant to Section 853(b).

Under Section 853(b), the Commission may, in extraordinary situations, exempt certain transfers of utility property from the requirements of Section 851 and may approve these transactions even if the utility did not obtain prior Commission approval.[17]

For example, in D.02-01-055, we granted PG&E's application to exempt six sales of utility property from the requirements of Section 851 pursuant to Section 853(b). PG&E had sold the properties without our advance approval, based on a mistaken belief that the Section 851 did not apply to these sales because the property was no longer used or useful for utility purposes.[18] We

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[15] See D. 02-01-055.

[16] Id.

[17] Section 853(b) states in pertinent part:

> The commission may from time to time by order or rule, and subject to those terms and conditions as prescribed herein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision …

[18] In each of these transactions, PG&E had sold assets used to provide electric service to customers directly to the customers. The customers used the purchased assets to obtain

*Footnote continued on next page*

found it appropriate to exempt these transactions from the requirements of Section 851 because:

- In D.99-02-062, we had directed PG&E to search its records for previous sales of assets that occurred without our prior approval as required by Section 851 and to file an application for approval of these sales. This order implied that we would approve the application if such sales were reasonable and in the public interest.
- Since the sales benefited, rather than harmed, ratepayers, the sales were reasonable and in the public interest. Therefore, it was not necessary to deem the transactions void to protect the public interest.
- Since the purchasers bought the utility property in good faith and for value, it would be unfair to force them to relinquish the assets.
- Due to the passage of time, it would not be possible, as a practical matter, to unwind the sales.
- There was no evidence that PG&E's failure to seek our advance approval of the sales resulted from egregious conduct or intentional violations of Section 851.

Here, we find that extraordinary circumstances exist which warrant our exemption of the previous sale of Property B to Bigge Crane from the requirements of Section 851 pursuant to Section 853(b). The sale of Property B will not harm PG&E ratepayers, because PG&E does not need the property for utility purposes in the future. PG&E has also retained adequate easements to ensure that it may enter Property B as necessary to maintain and operate its utility facilities on the site. Therefore, the transaction is reasonable and in the public interest, and we need not deem the sale of Property B void to protect the

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primary, instead of secondary, electric distribution service and thereby qualified for lower PG&E rates for electricity.

interests of ratepayers or the public. Further, Bigge Crane and its successor in interest, BP1 bought the property in good faith and for a fair consideration. BP1 has expended considerable resources developing plans for a light industrial/business park to be located on the property, and the County of Contra Costa has approved the project to be located at this site. Therefore, it would be unreasonable and unfair to Bigge Crane and BP1 to deem PG&E's sale of Property B void because of PG&E's failure to seek our advance approval as required by Section 851. Moreover, since over three years have passed since the sale of Property B to Bigge Crane, and Bigge Crane has assigned its interest in the property to BP1, which is developing the site, practical difficulties could arise if the sale were unwound at this time. In addition, PG&E's counsel has explained that PG&E's failure to comply with Section 851 resulted from an oversight.[19]

Therefore, based on the unique circumstances of this case, we exempt PG&E's previous sale of Property B to Bigge Crane from the Section 851's requirement for prior Commission approval pursuant to Section 853(b) and approve this transaction prospectively, effective immediately. However, we do not grant retroactive approval of this transaction.

We caution PG&E that under Section 853, the Commission may exempt transactions from the requirements of Section 851 only in exceptional circumstances and that continued violations of Section 851 by PG&E may result in monetary sanctions under Section 2107.[20] We are particularly troubled that

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[19] Reporter's Transcript, Prehearing Conference, April 18, 2005 at pages 2:19-28, 3:1-28, 4:1-28, 5:1-17.

[20] Section 2107 states:

> Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply

*Footnote continued on next page*

PG&E did not seek our prior approval for this transaction, which involved the sale of approximately 43 acres of land for over $2 million. PG&E's failure to seek our approval before selling Property B to Bigge Crane is also disturbing in view of our clear guidance to PG&E in previous decisions.[21] Based on prior Commission decisions and our orders, PG&E should have been well aware that it needed to obtain our approval pursuant to Section 851 before selling Property B to Bigge Crane. We therefore direct PG&E to seek advance Commission approval of any transfers of interests in property that is used or useful in the provision of utility services as required by Section 851 in order to avoid the possibility of monetary sanctions for future violations.

## III. Categorization and Need for Hearings/Public Review and Comment

Based on our review of this application, we find no need to alter the preliminary determinations made as to categorization and the need for a hearing made in Resolution ALJ 176-3147, dated February 10, 2005.

## IV. Comments on Draft Decision

Section 311(g)(1) requires that this decision be served on all parties and be subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that the 30-day comment period may be

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with any part or provision of any order, decision, decree, rule, direction, demand or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense.

We have previously imposed monetary sanctions against public utilities that transfer utility assets without prior Commission approval in violation of Section 851. See D.03-08-068, D.99-08-007.

[21] See D.02-01-055, D.99-02-062

reduced or waived upon the stipulation of all persons in the proceeding. The parties have agreed to shorten the comment period to 10 days. Comments are due on January 6, 2005. Reply comments, if any, are due by January 10, 2006 at noon.

Comments were filed by DRA on January 6, 2006. We have reviewed the comments received and made changes as appropriate throughout the decision.

## V. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Myra J. Prestidge is the assigned Administrative Law Judge in this proceeding.

## Findings of Fact

1. PG&E's sale of Property A to BP1, and Property B to BP1 and Bigge Crane, respectively, will not interfere with PG&E's utility operations or with service to PG&E's customers and the public.

2. PG&E previously entered into an agreement to sell Property B to Bigge Crane in 2001 without prior Commission approval as required by Section 851.

3. In 2002, Bigge Crane and PG&E entered into an agreement in which Bigge Crane assigned its interest in Property B to BP1.

4. PG&E conveyed Property B to BP1 without prior Commission approval in 2002 in violation of Section 851.

5. PG&E acquired Property A and Property B in 1974 and 1979, respectively, for the expansion of the western boundary of PG&E's Pittsburg Power Plant.

6. The original cost and net book value for Property A was $6,303.

7. Based on the sale of Property A, PG&E expects to receive $43,697 as the pre-tax gain on sale and $25,892 as the after-tax gain on sale.

8. The original cost and net book value for Property B was $782,043.

9. Based on the sale of Property B, PG&E received $1,148,402 as the pre-tax gain on sale and $680,474 as the after-tax gain on sale.

10. PG&E removed Property A and Property B from ratebase and transferred the properties to non-utility accounts in 1986 and 1985, respectively.

11. Property A was in ratebase from 1974 until 1986.

12. Property B was in ratebase from 1979 until 1985.

13. Ratepayers did not contribute to PG&E's original acquisition of Property A and Property B.

14. Ratepayers paid all operating, maintenance, and property tax costs while Property A and Property B were in ratebase.

15. PG&E states that it does not have separate records of expenses associated with specific parcels of land owned by PG&E, except for property tax expenses that are linked to individual parcels of land.

16. PG&E states that information on the annual property taxes for Property A from 1974 to 1985 was not available.

17. The parties have stipulated that, according to data provided by PG&E, the property taxes for Property A in 2003 and 2004 were $1,535 and $1,592, respectively.

18. The parties have stipulated that the annual property taxes for Property B from 1994 to 2003 were as follows:

| | |
|---|---|
| 1994 - $20,448 | 1999 - $25,704 |
| 1995 - $20,418 | 2000 - $25,121 |
| 1996 - $25,331 | 2001 - $31,398 |
| 1997 - $25,449 | 2002 - $32,009 |
| 1998 - $25,578 | 2003 – sold |

19. PG&E's current rate of return is 8.77%.

20. PG&E's current net to gross multiplier for electric utility is 1.797725.

21. It is appropriate to defer our decision regarding the allocation of PG&E's gain on sale resulting from the sale of Property A and Property B until after the Commission has issued a final decision in the gain on sale rulemaking (R.04-09-003), so that we may consider these issues on a broad, policy basis with participation from a greater number of affected parties.

22. It is appropriate to defer our consideration of the disputed factual issues regarding PG&E's revenue requirements for Property A and Property B and annual expenses for Property A and Property B until after the Commission has issued a final decision in the gain on sale rulemaking (R.04-09-003), because it is uncertain whether these issues will be relevant to our decision regarding allocation of PG&E's gain on sale from the sale of Property A and Property B, and PG&E claims that it does not have records related to these issues for individual properties that have been removed from ratebase many years ago.

23. Under Section 853(b), exemption of PG&E's sale of Property B to Bigge Crane/BP1 from Section 851's requirement for advance Commission approval is appropriate based on the unique circumstances of this case.

24. PG&E's sale of Property B to Bigge Crane/BP1 did not harm ratepayers or the public.

25. PG&E's sale of Property B to Bigge Crane/BP1 was reasonable and in the public interest.

26. It is not necessary to deem PG&E's sale of Property B to Bigge Crane/BP1 void in order to protect the public interest.

27. Bigge Crane/BP1 purchased Property B in good faith and for a fair consideration.

28. Since BP1 has expended considerable time and resources developing a plan for a light industrial/business park to be located on Properties A and B, and

the County of Contra Costa has approved this use of the site, it would be unreasonable and unfair to BP1 to void PG&E's sale of Property B based on PG&E's failure to comply with Section 851.

29. Since over three years have passed since PG&E's sale of Property B to Bigge Crane/BP1, and Bigge Crane has transferred its interest in Property B to BP1, which is developing the site, practical difficulties could arise if the Commission voided the sale of Property B based on PG&E's prior violation of Section 851 at this time.

30. PG&E states that its failure to obtain prior Commission approval of its sale of Property B to Bigge Crane/BP1 was the result of an oversight, rather than an intentional violation of Section 851.

31. Based on prior Commission decisions and orders regarding transfers of PG&E property, PG&E should have been well aware of the requirement to obtain prior Commission approval pursuant to Section 851 before transferring Property B to Bigge Crane/BP1.

32. The County of Contra Costa is the Lead Agency for this project under CEQA.

33. The Commission is a Responsible Agency for this project under CEQA.

34. BP1 proposes to develop a light industrial/business park on the property.

35. The County of Contra Costa has adopted a mitigated negative declaration, for the project, which found that with appropriate mitigation measures, the project would not have a significant adverse impact on the environment.

36. The County's environmental documents are adequate for our decision-making purposes under CEQA.

37. We concur with the County's findings in the mitigated negative declaration that the project, as mitigated, will not have a significant adverse impact on the environment.

## Conclusions of Law

1. Consistent with Section 851, PG&E's sale of Property A to BP 1 is in the public interest and should be authorized.

2. Section 851 requires prior Commission approval of any transfer of utility property that is used or useful in the provision of utility services.

3. Section 851 does not authorize the Commission to retroactively approve a transfer of utility property.

4. Section 853(b) provides that the Commission may exempt any utility or class of utility from the requirements of Section 851 if the application of these requirements is not necessary in the public interest.

5. Under Section 853(b), the Commission may exempt certain transfers of utility property from the requirements of Section 851 and approve such transfers only in exceptional circumstances.

6. Under Section 2107, the Commission may impose monetary sanctions which range from a minimum of $500 to a maximum of $20,000 per offense based on a utility's failure to comply with Section 851, as well as certain other legal and Commission requirements.

7. This decision approving the sale of Property A to BP1 and approving the sale of Property B to Bigge Crane/BP1 pursuant to Section 853(b) should be effective today in order to allow these transactions and the project to proceed expeditiously.

## O R D E R

**IT IS ORDERED** that:

1. Pacific Gas and Electric Company (PG&E) is authorized to sell 2.01 acres of property located in Contra Costa County, identified as Contra Costa County Assessor's Parcel Number 098-240-003 (Property A), to Bay Point Venture One (BP1) pursuant to Pub. Util. Code § 851 (Section 851).

2. PG&E's request for retroactive approval pursuant to Section 851 of its agreement to sell 42.93 acres of property located in Contra Costa County, identified as Contra Costa County Assessor's Parcel Numbers 098-250-015 and 098-250-016 (Property B), to Bigge Crane & Rigging Company (Bigge Crane) in 2001 and the conveyance of Property B to BP1 in 2002 pursuant to Bigge Crane's assignment of the property to BP1 is denied.

3. PG&E's request for exemption pursuant to Pub. Util. Code § 853(b) of its agreement to sell Property B to Bigge Crane in 2001 and its subsequent conveyance of the property to BP1 in 2002 from Section 851's requirement for prior Commission approval is granted, based on the unique circumstances of this case.

4. PG&E's agreement to sell Property B to Bigge Crane in 2001 and subsequent conveyance of Property B to BP1 in 2002 is approved, on a prospective basis only.

5. PG&E shall record and track the revenue received from the sale of Property A and Property B in its Real Property Gain/Loss on Sale Memorandum Account, pending our resolution of issues related to the allocation of PG&E's gain resulting from the sale of Property A and Property B after the Commission has issued a final decision in the gain on sale rulemaking (R.04-09-003).

6. Since PG&E previously sold Property B without our prior approval in violation of Section 851, PG&E shall place, retain, and track an amount equivalent to its revenues from the sale of Property B in its Real Property Gain/Loss on Sale Memorandum Account, pending our resolution of the issues related to the allocation of PG&E's gain on sale resulting from the sale of Property B, pending our final decision in R.04-09-003.

7. PG&E shall promptly apply for advance Commission approval of transfers of any property interests that are used or useful in the provision of utility services pursuant to Section 851, in order to avoid potential monetary sanctions for violation of Section 851.

8. Application 05-01-026 is closed.

This order is effective today.

Dated _____, at San Francisco, California.